No. 89-61

In the Supreme Court of the United States

OCTOBER TERM, 1989

UNITED STATES OF AMERICA, PETITIONER

v.

FILIBERTO OJEDA RIOS, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOINT APPENDIX

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FILED JULY 14, 1989
CERTIORARI GRANTED OCTOBER 10, 1989

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In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-61

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

No. H-85-50

UNITED STATES OF AMERICA

v.

VICTOR MANUEL GERENA, ET AL., DEFENDANTS

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
1985	
August 23	Indictment
1986	
March 21	Superseding indictment
April 11	Motion to suppress for delay in sealing filed
Dec. 22	Supplemental motion to suppress filed
1987	
Jan. 5 & 6	Government's opposition to motion to supress filed
Sept. 1	Hearing on suppression motion begins
1988	
May 4	Supression hearing ends
May 26	Government files opposition to motion to suppress and proposed findings of facts
June 10	Defendants' proposed findings of facts filed
June 13	Defendants' memorandum of law filed
June 15	Government's reply brief filed

DATE	PROCEEDINGS
July 7	Order denying in part and granting in part motion to suppress tapes for sealing delays
July 20	Government's motion for reconsideration
August 2	Denial of motion for reconsideration
August 5	Notice of Appeal filed
1989	
May 5	Opinion of the Court of Appeals affirming judgment

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

CRIMINAL NO. H-85-50 (TEC)

UNITED STATES OF AMERICA

v.

VICTOR MANUEL GERENA, ET AL.

January 5, 1987

MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT MELENDEZ CARRION'S MOTION TO SUPPRESS EVIDENCE OF ELECTRONIC SURVEILLANCE

INTRODUCTION

This memorandum of law is submitted in opposition to the defendant Melendez Carrion's motion to suppress evidence of electronic surveillance, dated April 11, 1986. The defendant's claim that the Government failed to seal in a timely manner tapes of communications intercepted in accordance with orders of the court issued pursuant to Title 18, United States Code, Section 2518.

All electronic surveillance evidence in this case was based upon orders issued by the court in the Districts of Puerto Rico and Massachusetts.

* * * * *

AFFIDAVIT

I, Frank J. Bove, Trial Attorney, United States Department of Justice, being first duly sworn, state:

1. I am a Trial Attorney with the Criminal Division of the United States Department of Justice and have held that position since April 1, 1983. I am currently assigned to the General Litigation and Legal Advice Section where my primary responsibility at this time is the investigation of violations of criminal law at the Lorton Reformatory, Lorton, Virginia.

2. From April 4, 1983 until July 29, 1985, I was assigned to assist in the investigation of violations of federal criminal law on the island of Puerto Rico. As part of my duties in Puerto Rico, I was assigned as one of the supervising attorneys for an electronic surveillance investigation into the violation of federal criminal law by clandestine Puerto Rican terrorist organizations. During the course of this investigation, thirty separate applications for authority to intercept oral communications from various premises were submitted to the United States District Court in Puerto Rico of which fifteen were submitted by me between April 27, 1984 and June 6, 1985.

3. On three occasions during this electronic surveillance investigation motions were submitted to the United States District Court in Puerto Rico requesting that the Court seal the recordings and logs in accordance with Section 2518(8)(a) of Title 18, United States Code.

4. (a) I was aware of our responsibility under 18 U.S.C. § 2518(8)(a) to make available to the issuing judge the recording of the contents of any wire or oral communication. Since the targets of this investigation changed residences and vehicles so frequently, we considered the interceptions at various locations to be interrelated and part of the same investigation and submitted motions to seal

at those times when there occurred a meaningful hiatus in our authority to intercept communications.

(b) I was not aware of any legal authority inconsistent with our procedure and believed that we were complying with the requirement of 18 U.S.C. § 2518(8)(a).

5. (a) The first sealing order was signed on October 11, 1984, the day after expiration of authority to intercept conversations from the 1982 Datsun Sentra that was being driven at that time by defendant Filiberto Ojeda Rios. This represented the first time since electronic surveillance began on April 27, 1984 (except for the one-day hiatus explained in paragraph 6(a) herein) that the United States was without authority to monitor at any location pertaining to this investigation.

(b) the next continuous period of electronic surveillance began on November 1, 1984 at Calle 14, Vega Baja, and did not expire until May 30, 1985. As the expiration of this period of electronic surveillance approached, I reminded the investigating agents orally and by memorandum dated May 29, 1985, that the tapes should be sealed as we had done on October 11, 1984. This was the period during which the Federal Bureau of Investigation was preparing the affidavit that was to accompany the application for authorization to intercept conversations from a 1980 Datsun that figured in the investigation as well as unsuccessfully attempting to place electronic surveillance equipment in that vehicle. That application was submitted to Chief Judge Perez Gimenez on June 6, 1985 on which date an order was entered authorizing the interception of conversations from that vehicle for a period of thirty days. This also was the period during which the Federal Bureau of Investigation was actively engaged in physical surveillance of the El Centro Condominium to substantiate the probable cause that led to the June 27, 1985 application for authorization to intercept conversations at that loca-

tion. The four hundred sixty-nine reels of tapes were sealed by Chief Judge Perez Gimenez on June 15, 1985 pursuant to our motion.

(c) The final sealing of electronic surveillance tapes occurred on September 14, 1985, and involved tapes which resulted from monitoring of conversations at the El Centro Condominium from June 27, 1985 until August 30, 1985. I am not familiar with the circumstances surrounding this sealing as I left Puerto Rico on July 29, 1985 and was working in Washington, D.C. at the time.

6. (a) A one-day hiatus occurred on Sunday, September 9, 1984, during the otherwise continuous authority to monitor the 1982 Datsun Sentra from May 11, 1984 to October 10, 1984. This one-day cessation of authority to monitor occurred only because then Assistant Attorney General in Charge of the Criminal Division, Stephen S. Trott, under whose authorization these applications were filed, was out of the country and unable to authorize the applications until Monday, September 10, 1984.

(b) A similar one-day hiatus from authority to monitor occurred on December 2, 1984 during the otherwise continuous authority to monitor conversations at Calle 14, Vega Baja, Puerto Rico, from November 1, 1984 to May 30, 1985. This one-day cessation of authority to monitor occurred only because United States District Chief Judge Juan Perez Gimenez, to whom these applications were presented, did not return to Puerto Rico from a business trip to Washington, D.C. until Sunday, December 2, 1984, and, consequently, we were unable to present the renewal application to him until Monday morning, December 3, 1984.

(c) A final break in authority to monitor the public telephones in Vega Baja occurred from February 18, 1985 until February 28, 1985. During this time, however, the United States continued this electronic surveillance investi-

gation by maintaining authority to monitor the residence at Calle 14, Vega Baja. Thus, in following our practice of considering these interceptions at various locations to be interrelated and part of the same investigation (see paragraph 4(a)), we did not consider this an event that necessitated immediate sealing. Moreover, this eleven-day hiatus in monitoring authorization at the public phones in Vega Baja was necessitated by the decision of the Justice Department's Office of Enforcement Operations to have the Federal Bureau of Investigation extensively expand and revise the affidavit that was to accompany the application for renewal. This revised and expanded affidavit was presented to Chief Judge Perez Gimenez on March 1, 1985 at which time he entered an order authorizing continued interceptions of wire communications at the public telephones in Vega Baja.

/s/ Frank J. Bove

FRANK J. BOVE
Trial Attorney
United States Department of Justice

SUBSCRIBED AND SWORN TO before me this 31st day of December, 1986.

Pamala A. Nelson
Notary Public for
District of Columbia
Comm. expires 1/31/91

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

CRIMINAL NO. H-85-50 (TEC)

UNITED STATES OF AMERICA

v.

VICTOR MANUEL GERENA, ET AL.

RULING ON GOVERNMENT'S MOTION TO QUASH AND MODIFY SUBPOENAS DATED AUGUST 31, 1987

On August 31, 1987, the Defendants served four subpoenas duces tecum upon the Government which were directed to Assistant United States Attorney Albert S. Dabrowski, Assistant United States Attorney Frank Bove, Deputy United States Attorney Robert Mueller and Assistant United States Attorney Roberto Moreno. The subpoenas seek documents from each individual. The Government has moved to quash the subpoena directed at Assistant United States Attorney Dabrowski and has moved that the Court modify the subpoenas directed to Messrs. Bove, Mueller and Moreno. The Court heard argument on the instant motion on September 1, 4 and 8, 1987.

Pursuant to Rule 17.(c) of the Federal Rules of Criminal Procedure, the Court hereby orders that the subpoena directed at Mr. Dabrowski be quashed and that the subpoenas directed at Messrs. Bove, Mueller and Moreno be modified as set forth below.

Statement of Facts

The four subpoenas duces tecum which are the subject of the instant motion all sought compliance by September 1, 1987, and all, with one exception, seek the following documents. (The subpoena directed to Mr. Dabrowski, does not contain paragraph 3.):

1. Any documents of any kind, including, but not limited to, memoranda, directives, reports, letters, interoffice correspondence, airtels, etc. in the possession, custody or control of the United States Justice Department, including, but not limited to, the offices of the F.B.I., the U.S. Attorney's offices in Puerto Rico and Connecticut, and the Criminal Division of the Justice Department in Washington, D.C., that pertain or relate, in whole or in part, in any way to the Title III electronic surveillance in the above-captioned case and, in particular, to the statutory sealing requirement contained in 18 U.S.C. § 2518, issued or written at any time between January 1984 and the present.

2. Any memoranda, publications, booklets, books or training materials of any kind, published and/or printed by or for the Department of Justice, including, but not limited to, the United States Attorney's Manual and training manuals from the Attorney General's office, which were available to you at any time between January 1984 and the present.

3. A list, by name of case, docket number, and location of court, of any Title III cases in which you have been involved in any manner as an employee of the Department of Justice (excluding pending investigations not yet disclosed).

Discussion

At the hearing on the instant motion, counsel for the defendants agreed that the subpoena for a list of "any Title III cases in which [Messers. Bove, Mueller and Moreno] may have been involved" is beyond the scope of Rule 17(c) of the Federal Rules of Criminal Procedure as it calls for a list which does not already exist.

With regards to paragraphs one and two of the subpoenas, counsel for the Government agreed to provide the defendants with those documents and publications, related to Title III sealing requirements, which were in the possession of Messrs. Bove, Mueller and Moreno during the period of time that electronic surveillance was being conducted in this case. However, the defendants asserted that, in addition to the items encompassed by the time period described above, they had special need for those Title III sealing documents which were created between the conclusion of the electronic surveillance and the present time. The defendants argue that such documents would demonstrate that the Government had conspired to cover-up the Government's failure to seal the tapes. Defendants maintain that by asserting a legal theory intended to explain any delay in sealing, the Government has waived any privilege that would otherwise attach to said documents.

To the extent that the subpoenas duces tecum call for privileged material they are hereby modified. Those documents which were created by the Government after September 14, 1985 (the date the last electronic surveillance tapes were sealed) comprise material plainly protected from discovery under the attorney-client privilege and/or the work product doctrine. Defendants' assertion that the Government has waived the privilege by raising a defense to the alleged sealing delays is wholly unconvincing and lacking in authority. With respect to material created after September 14, 1985, the Government has taken no actions which can be construed to constitute waiver.

However, in order for this Court to investigate the defendants' allegation that the Government may have attempted to cover-up any sealing delays, the Government shall forthwith file under seal all materials created after September 14, 1985 which concern the question of sealing. The Court will review these documents *in camera* and determine whether there is any evidence of irregularity.

Accordingly, the subject documents created after September 14, 1985 are privileged and the instant subpoenas duces tecum are modified so as to exclude them from their ambit. *United States v. McGrady,* 508 F.2d 13, 18 (8th Cir. 1974), *cert. denied,* 420 U.S. 979 (1975). Moreover, as the subpoenas request all documents which relate to Title III electronic surveillance "in any way" and "[a]ny memoranda, publications, booklets, books or training materials of any kind . . . ," they are overly-broad, unreasonable and oppressive. Therefore, only those documents concerning Title III sealing matters which were available to Messrs. Bove, Mueller and Moreno between the time the electronic surveillance in this case was commenced and September 14, 1985 are deemed relevant, unprivileged and properly within the scope of the subject subpoenas. However, as Assistant United States Attorney Dabrowski was not assigned to this case until several months after the initial indictment was returned, the subpoena directed against him is hereby quashed.

Conclusion

The subpoena duces decum directed against Assistant United States Attorney Dabrowski is hereby quashed. The

subpoenas duces tecum directed to Messrs. Bove, Mueller and Moreno are hereby modified and only those materials concerning Title III sealing matters which were available to Messrs. Bove, Mueller and Moreno during the period of time the electronic surveillance was conducted, along with those documents created prior to September 14, 1985 which bear directly upon the issue of sealing are properly within the scope of the subject subpoenas duces tecum. The subpoenas are further modified so as to exclude the list of Title III cases in which the subpoenaed attorneys had been involved which was sought in paragraph 3.

The Government shall forthwith file under seal, for *in camera* review, all written material created after September 14, 1985 relating to alleged sealing delays.

SO ORDERED.

Dated at Hartford, Connecticut this 8th day of September, 1987.

/s/ T. Emmet Clarie
T. EMMET CLARIE
Senior District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

H-85-50

UNITED STATES OF AMERICA, PLAINTIFF

vs.

VICTOR GERENA, ET AL., DEFENDANTS

September 1, 1987

Before: Honorable T. EMMET CLARIE, U.S.D.J.

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JOHN A. DANAHER, ESQUIRE
WILLIAM J. CORCORAN, ESQUIRE
DAVID A. BUVINGER, ESQUIRE

For the Defendant Antonio Camacho-Negron:
LINDA BACKIEL, ESQUIRE
424 West Schoolhouse Lane
Philadelphia, Pennsylvania 19144

* * * * *

[234] Q. All right. But aside from the A tape circumstances where you were doing that at the time in between the completion of one reel-to-reel and rewinding, at any time during the monitoring operations, it was possible for monitoring agents to record on the cassett recorder without recording on the reel-to-reels?

A. Yes, that's correct.

Q. All right. You, during the course of your testimony, refreshed your recollection by referring to a document you had before you.

What is that document, sir?

A. I have the Count C memo that I have before me.

Q. All right. Now, that memo which has been marked, I believe, as Government's Exhibit 376 or 75?

A. Seventy-five.

Q. Excuse me. This is the memo which sets forth the recording procedures to be followed during the electronic surveillance operations, is that correct?

A. That's correct.

[235] Q. All right. Were these instructions in effect throughout the entire electronic surveillance operations; that is, from April 27th, of 1984 until the expiration of the surveillance, electronic surveillance on August 30th, 1985?

A. Yes.

Q. Is there anything in that document that refers to this work copy that you've testified about today?

A. No, sir, there isn't.

Q. You indicated you had advised Mr. Corcoran about the existence of these work copies prior to your testimony today?

A. That's correct.

Q. And when is the first time that you advised counsel for the Government of the existence of the work copies?

A. I couldn't say for sure.

Q. Give us your best estimate.

A. You're talking about the current prosecuting team?

Q. Correct.

A. I would say sometime after October 12th of 1985.

Q. Can you tell us why it is that no mention [236] is made in Government's Exhibit 375 about the cassette recorders and the work copies?

A. Yes, sir.

Q. Why is that?

A. We discussed this at length prior to initiating the Title 3, the work copies—

THE COURT: When you say "we", who is we?

THE WITNESS: I'm sorry, Your Honor. George Clow, Frank Bove, Roberto Moreno, Cal Sieg, in particular on this case, on this specific instance.

We made no mention of that because the particular reason for the cassette copy was strictly work copy. When you were going to use it for the agents to work off of, when you were going to erase those tapes, that's why the basic thing was we made no mention anywhere of that work copy. Just to keep—really to keep questions from being asked about it.

Q. (BY MR. REEVE) Well, you mean like questions by nosey defense counsel or are you referring to questioning by monitoring agents?

MR. CORCORAN: Objection.

THE WITNESS: No, in your words, sir, [237] nosey defense counsel.

Q. (BY MR. REEVE) I thought the extent of these directions was to advise the monitoring agents of what specifically they should and should not do at the various sites during the conduct of electronic surveillance in this case?

A. That is correct.

Q. So how did you advise them, since you omitted it from the written terms that were provided to them?

A. As I said, it was omitted purposefully. Those instructions were given to the monitors verbally.

Q. So that was part of the oral instructions that you and/or Agent Clow provided the agents as they came down, as you testified, every thirty to sixty days?

A. That's correct.

* * * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

Criminal Number H-85-50 (TEC)

UNITED STATES OF AMERICA, PLAINTIFFS

VS.

VICTOR MANUEL GERENA, ET AL., DEFENDANTS

September 8, 1987

Before: Honorable T. EMMET CLARIE, U.S.D.J.

APPEARANCES

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* * * * *

[37] [MR. REEVE:] Mr. Bove, who may well say, "No, I never had any meetings," maybe that's not a true statement. But under this—under the ruling right now, as stated orally by the Court, it is that we can't ask other people who were present at these meetings to determine what happened.

THE COURT: We'll cross that bridge when we get to it.

MR. REEVE: But Your Honor, we're crossing that bridge right now unless we're going to recall Agent Rodriquez later.

THE COURT: The ruling of the Court will be that up through September 13, '85, as I stated previously, if there's anything in the file, as counsel said he would examine, if there's anything in the file giving directions as to how the sealing should take place and that memorandum is contrary to or inconsistent with anything that has come out or contrary to the law or—if it just exists, it shall be produced.

After the sealing has taken place, it is the Court's opinion that you cannot—you cannot destroy communication between counsel in the preparation for their case, whether defense counsel or Government counsel.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

Criminal No. H-85-50 (TEC)

UNITED STATES OF AMERICA

vs.

VICTOR MANUEL GERENA, ET AL., DEFENDANTS

October 15, 1987

Before: The Hon. T. EMMET CLARIE, Senior U.S.D.J.

SUPPRESSION HEARING

• • • • •

[52] BY MR. WIESELMAN:

Q. Go to the 192 for Levittown 784-9625.

A. What would be the tape number?

Q. Forty-six, I'm sorry.

A. Okay. The 192 for 784-9625, tape number 46.

Q. Mr. Terrazas was the agent submitting property on the 192?

A. That is what I put here in my 192.

Q. That would mean he is the agent whose name appeared last on the 504; is that correct? Is that how you would determine what agent's name to put in there?

A. Yes.

Q. I may be wrong, but let's look at the 504 for 9625.

A. Yes.

Q. That 504 seems to indicate to me that Calvin Sieg is the man dropping off the tape. How is it possible that Mr. Terrazas' name appears on the 192?

A. Correct. Mr. Sieg was the agent, and in [53] this case, gives custody to the other agent.

Q. So in fact even before Mr. Sieg's name is Maria Villaruel's name as a monitoring agent?

A. Correct.

Q. But yet, Mr. Terrazas' name appears on the 192 as the person dropping off the tape. Do you have an explanation as to how that sort of discrepancy could occur?

A. No, sir, I have no explanation.

Q. Is it possible there was another 504 that may have had Mr. Terrazas' name there?

A. No. It is a 504 pertaining to this 192, because the tape number is right on the face of the 192.

Q. But you don't know whether this 504, according to your procedure, perhaps there were errors on it and it was corrected, if this was a recreated 504, you wouldn't know that fact, would you?

A. I wouldn't know, but may I see the other for the same date?

Q. Sure, Look at the others.

(Pause.)

* * * * *

[61] Q. On both of those days, you have the three telephones with Mr. Terrazas incorrectly as the delivering agent. That is on June 11. On June 12, you have the three telephone reels incorrectly stating on the 192 that they were delivered by Mr. Terrazas, yet, on both those days, the residence tapes, the 504's correctly indicate that Mr. Sieg dropped off the tapes. Can you explain that discrepancy?

A. No, sir.

Q. Since the tapes of June 11 were all received by you at the same time, at 8:35 in the morning of June 12, isn't it strange that you would have put Mr. Terrazas as the 192 receiving agent for three of them and Mr. Sieg as the 192 receiving agent for just the fourth one, even though—

MR. CORCORAN: I object. It is a question as to where—

THE COURT: Isn't it strange—

MR. WIESELMAN: I will withdraw that.

* * * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

Criminal No. H-85-50 (TEC)

UNITED STATES OF AMERICA

vs.

VICTOR MANUEL GERENA, ET AL., DEFENDANTS

October 27, 1987

Before: The Hon. T. EMMET CLARIE, Senior U.S.D.J.

SUPPRESSION HEARING

[76] BY MR. CORCORAN:

Q. Mr. Bove, what is your present position with the criminal division of the Department of Justice?

A. I'm a trial attorney with the criminal division. I'm employed in the general litigation and legal advice section.

Q. In Washington, D.C.?

A. That's right.

Q. Mr. Bove, what is your educational background?

A. I went to Rutgers University. Bachelor's degree from there in 1968. Went to Rutgers Law School. Got a JD there in 1971.

Q. After law school, after graduating law school, what did you do?

A. I became a Law Clerk to The Honorable Daniel H. Huyett, III.

THE COURT: What's his name?

THE WITNESS: H-u-y-e-t-t. He's in the Eastern District of Pennsylvania, in Philadelphia.

• • • • •

[112] Q. Mr. Bove, directing your attention to the month of October, of 1984, as one of the supervisory attorneys in this case, you were one of the people who had responsibility to comply with the provisions of the Title III. statute.

Did you take any steps to familiarize yourself with the provisions of that statute?

A. Yes, I did.

Q. What steps did you take?

A. I read a number of items before we went up on the Title III. in April 1984.

Q. What did you read?

A. I read the statute first. That was a good starting point. I read the Title III. sections. In addition to that, I read a monograph that you had prepared for the Department of Justice dealing with issues involving Title III. wiretapping.

I had access to and used a Fishman hard copy book dealing with interception practices. The other item I had access to, which I used at various times in this investigation, was a paper book, Georgetown Law Journal issue dealing with criminal law, and it had a portion on interception issues.

Q. That is Georgetown's annual review in the drill procedure in the 12 circuits and the Supreme Court?

A. That's correct.

Q. These are materials which you have prior to going up on the wire April 784. Were you aware there was a sealing requirement in the statute?

A. Yes, I was.

Q. Were you aware of that in July of '84?

A. Correct.

Q. In August of '84?

A. Correct.

Q. September and October of '84?

A. Correct.

• • • • •

[125] Q. When did that authority end?

A. The authority ended on the Datsun on October the 10th.

Q. Next day you filed the motion?

A. That's correct.

Q. Now, I want to direct your attention to paragraph 5 of that motion.

A. I have it.

Q. It reads, "Through October 10, 1984 Special Agents of the FBI at all times were physically, technically ready and able to accept communications pursuant to one or more of the Court's authorizations." Is that correct?

A. Yes.

Q. Did you write that?

A. Yes, I did.

Q. What was your purpose in putting that in the motion?

A. I was explaining to the Judge why we were coming to him at that time to seal these tapes. We still had authority at that point to intercept conversation from the 1983 Jeep Cherokee and the 1982 Jeep Suzuki. We had no physical and [126] technical capability of doing it at that time because the agents had not been able to find a safe

time and situation to make the surreptitious entry into those vehicles and put the equipment in.

Consequently, this was the first time when we had no physical capability of intercepting in this investigation where we had any authority to intercept.

Q. As to the Levittown tapes in this case, in your view at that time, when were you obligated to seal those tapes?

A. The theory that I worked under and put into this motion to seal was that our obligation came up on October 10, 1984 when we had our first break in our physical capability of intercepting conversations in any location where we had a bug.

Q. When was your obligation to seal the Datsun tapes; when did that arise?

A. When the order expired on October 10.

Q. And Calle Taft and El Cortijo?

A. The same day.

THE COURT: How about the Levittown location? That expired, depending on which date you take, the latest one, July 23, '84, they hadn't gotten anything since July 9, '84, as I [127] understand it as a practical matter.

Your theory, as you expressed it, was applicable to October 10, '84. How did it apply to Levittown?

THE WITNESS: I understand your point, your Honor. I made the decision and no one that I discussed the case with at that time suggested that I make any other determination. The decision that I made was that this was all an interrelated investigation.

As I pointed out, the locations were changing so rapidly that by the end of September and early October 1984 we literally had authority to intercept at seven different facilities, either phones, cars and/or residences.

There was no telling at that point how often this investigation was going to take another turn.

To us the only reason we went in and sought authority to intercept conversations at El Cortijo and Bayamon was because that was the latest address where we felt that Ojeda was living.

The only reason we switched from Levittown was because his residence, in effect, switched. At that point we thought it might have [128] been a temporary switch. We had no way of knowing, and we felt we were still involved in the same interrelated investigation.

I don't think I had any thoughts at that time that this investigation would last for frankly, another year and would involve so many locations. It, in fact, did, but that was the theory that I operated under.

• • • • •

[130] A. I didn't feel that the requirement to seal came up until we had a break in the investigation. Not to be repetitious, but I felt that the first break came not on October 10, because that was the first time when we had no physical or technical capability of intercepting any conversations of any targets in this case under a court order.

THE COURT: As I understand it, your application of the statute, as you saw it, was that it was applicable to the target subject, so to speak, as long as there was a continuous order against him rather than the location being the target where the authorization originally stemmed from?

THE WITNESS: That's the way I viewed it, your Honor. Hindsight is always more accurate. Having read a lot more cases in the last three years about this area of the law, not wanting to ever jeopardize the federal investigation, I might handle it differently today, but that's the way I viewed it at that time.

• • • • •

[142] Q. Let me ask you this: To what extent does that hiatus period at the public telephones at [143] Vega Baja come into play with regard to sealing the tapes from the public telephones in Vega Baja?

At the time what was your position with regard to the statutory requirement how that hiatus played a part, if any?

A. I operated under the assumption that hiatus did not necessitate any sealing.

Q. Any sealing of which tapes?

A. Of the tape from public telephones.

Q. So, the public telephones were authorized by an order of January 18th, and on the 17th it was shut down, and there's a hiatus period; is that right?

A. That's right.

Q. During that period of time were communications intercepted from the residence?

A. We certainly had authority and physical capability of intercepting conversations at the residence.

I'd have to check the logs to specifically tell you whether, in fact, there were conversations. I don't know, off the top of my head.

THE COURT: The two dates in this interval period are what, Counselor? I think I [144] saw you pointing to them.

MR. CORCORAN: The numbers are February 17, 1985 and March 1, 1985.

From the exhibit, the first order to intercept conversations at the public telephones were signed on January 18th and it expires on February 17th, and then the next application for the public telephones at Vega Baja is made on March 1st and it's extended again on March 31 and April 30th and finally expires on May 30.

THE COURT: The period intervening is how many days?

MR. CORCORAN: The period intervening, your Honor, would be, I believe, 11 days.

THE COURT: Was there any authority existing for those 11 days, Mr. Bove?

THE WITNESS: At that time, your Honor, the Government had authority and physical capability of intercepting at the residence in Vega Baja. That application order was in effect.

THE COURT: That's just above it.

THE WITNESS: That's correct.

THE COURT: The public telephones, there was no existing order for 11 days; is that [145] correct?

THE WITNESS: I'm not sure if that's exactly 11 days, because February has fewer days, and I haven't counted them. It's approximately 11 days.

THE COURT: There was no authority existing for that period?

THE WITNESS: For the public telephones, that's correct.

BY MR. CORCORAN:

Q. That same 11-day period, Mr. Bove, there was authority at the residence at the Calle 14?

A. That's correct.

Q. Therefore, what was your position with regard to the effect, if any, of that hiatus with regard to the sealing requirement?

A. My position was that a brief hiatus like that did not necessitate a sealing of tapes from the preceding order.

* * * * *

[183] Q. Directing your attention to October 10, 1984, at that point you had the authority to [184] intercept both the Jeep Cherokee and the Jeep Suzuki at those two automobiles. You had the authority to intercept conversations from those vehicles; is that correct?

A. That's correct.

Q. Your testimony is that you did not have the physical capability to intercept because no bug was installed in either of those vehicles as of that date.

A. That's correct.

Q. So, you're not saying that there was a hiatus because you lacked legal authority to intercept, but because you did not have the physical capability—I believe those were the words you used—to intercept on or about October 10, 1984?

A. That's right. The way I looked at it you needed both; you needed authority and you had to have the physical capability of actually intercepting something.

* * * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

Criminal No. H-85-50 TEC

UNITED STATES OF AMERICA

vs.

VICTOR MANUEL GERENA, ET AL., DEFENDANTS

October 28, 1987

Before: The Hon. T. EMMET CLARIE, Senior U.S.D.J.

SUPPRESSION HEARING

* * * * *

[37] Q. All right. He was the one who was preparing the boxes on October 11, 1984, and you testified yesterday that the boxes weren't ready; is that right?

A. They all weren't ready, and that is why the Judge had to come back.

Q. Now, did you contact Agent Salicrup—did you contact Mr. Salicrup and say, "How long will it take you to get these boxes ready? We have to seal these tapes immediately"?

A. No. My contacts were with George Clow, I believe, and Joe Rodriquez before he left the island, and certainly with Marlene Hunter on several occasions. And at the time we would seal them.

Q. Did you tell Mr. Clow or Agent Rodriquez or Agent Hunter that you wanted to know how long it was going to take the FBI to get these tapes ready, and they should let you know immediately?

A. I don't remember the exact words of the conversation. I talked to them on several [38] occasions and, you know, asked them—reminded them to seal the tapes and present them to the judge. And perhaps I didn't indicate to them clearly as I could have what "immediately" meant. It certainly—in the words of one of the cases I read recently, it at least means sooner than later. But other than that, I'm still not sure what it means. But I realize we had an obligation to do it, if that answers your question.

Q. Well, Mr. Corcoran's—you called it something other than a memo, but the document that was written by Mr. Corcoran—

A. Right.

Q. —in the sealing section of that memo, it specifically says that the statute requires that you are do it immediately.

A. That's right. That is the language of the statute.

Q. And it says that Mr. Corcoran's memo advised you that if you don't do it immediately, you run the risk of suppression.

A. That's correct.

Q. And I take it that a careful prosecutor would read "immediately" to mean do whatever necessary to affectuate immediate sealing; is that [39] correct?

A. I think that is fair. In the case at that time that I was familiar with, the only case that I am aware of that cited Mr. Corcoran's monogram expressed anything that dealt with delays of eight to twelve months.

Q. That is the Gigante?

A. That is correct. The other case sited in that monogram do not express delays up to thirty or forty

days. I am not suggesting that I would want to delay it that long, but to put it back in historical context of May and June of 1985, that was what I was working with. And I regret, frankly, now that I didn't put more pressure on the FBI to do it sooner.

Q. All right. How did you learn of your responsibilities as a supervising attorney for an electronic surveillance operation? You had never done it before, where did you start and did you go to someone and say, "What are my obligations?" And if so, who did you go to?

A. I started before we went up—before reading the statute, obviously I read Mr. Corcoran's monogram, talked with other attorneys in our section, Including Mr. Corcoran, Mr. Bouvinger, I [40] discussed it from time to time with Marge Carlson. Mainly just by reading the statute and reading the format from previous Title III. surveillances and talking to attorneys who had been handling them before.

Q. When you say, "Reading the format from previous Title III. cases," what does that mean?

A. There had been previous Title III. cases, obviously, in the Department of Justice, and, you know, the records and files were available about what the applications looked like, what the affidavits looked like, motions to seal, things like that.

Q. All right. Did you ever receive anything in writing which delineated your responsibilities as a supervising attorney in electronic surveillance operation?

A. No.

Q. Did you ever receive in the course of your time as a United States attorney or as an attorney in the Department of Justice any electronic surveillance training?

A. I don't remember, sir, ever attending any seminars or conferences on electronic surveillance in my recollection. They have such seminars from [41] time to time, I don't remember ever attending any of them.

Q. All right.

Q. You as a U.S. Attorney are familiar with the U.S. Attorney's manual; is that right?

A. Yes, sir.

Q. All right. And there is a section in the U.S. Attorneys manual which deals with the electronic surveillance, does it not?

A. That's right.

Q. All right. And just by way of example, one of the things that it says in the electronic surveillance section of the U.S. Attorneys manual—and I am referring to section 9-7.314—is that you were to advise the technical agents to record and make records of all technical arrangements that they created in a electronic surveillance case. Were you aware of that requirement?

A. I don't believe I was.

THE COURT: Why don't you show him the section.

MR. REEVE: I will, your Honor. I asked the clerk, and it was my fault because I couldn't give her the number.

• • • • •

[44] Q. If you didn't advise them as supervising attorney, do you know how they would have found out or determined that that was a requirement?

A. Well, my experience with the Bureau is that they record everything. They never do anything without recording—I could never have a conversation with them if it wasn't recorded for future references. I don't mean that electronically recorded, I mean—

Q. Memorializing in writing?

A. Yes.

Q. All right. But you have no recollection of ever advising the technical agents of that requirement?

A. No, sir.

Q. All right. How did you get the sealing materials that were available to you? You [45] indicated in that there were four sources that you used, the Fishman treatise, Mr. Corcoran's memorandum and the other two were what?

A. The Georgetown Circuit Notes.

Q. Okay. Was the fourth the statute itself?

A. Yes.

Q. All right. I understand how you got the statute. How did you get Mr. Corcoran's memo and the Georgetown Circuit Notes? Did you make a request for those materials, or were they simply in San Juan, or what?

A. I don't specifically remember, counselor, whether I requested them, but I know that they were supplied to me long before we went up on the Title III. I am speaking about Mr. Corcoran's monogram. It was something that was circulated in the criminal division, and I had the use of it long before we went up. The same thing with the Fishman book, it was available to me.

Q. All right. So these weren't materials that were given to you specifically at the beginning of this electronic surveillance, perhaps they were materials that you had in your file or files which you had obtained during the course of your service for the Justice Department.

[46] A. I'm not sure how to answer that. They were available to me. Obviously we were contemplating a Title III. investigation, and the Justice Department wanted me to have the materials available, and they were considered valuable materials and they were supplied to me. Perhaps they wouldn't have been supplied to me if I were working on a different kind of case that were not likely to involve Title III. surveillance.

Q. All right. And were those the only materials that were supplied to you, or were those just the materials that you relied upon?

A. The only other source that would have been available to me, which I frankly did not use, was the *United States Attorneys' Manual* because that was different, that was in the main United States attorneys office and we worked in a separate office, and I didn't trust the reliability whether it was updated, frankly, and there are only so many sources you can follow and I elected to use the ones that I did use.

Q. If you had—certainly if you had wanted an updated *U.S. Attorneys Manual*, it would not have been difficult to get that from the Justice Department in Washington or some other source?

[47] A. I don't know how difficult it would be, frankly. Sometimes it took quite a bit of time to get something from Washington to Puerto Rico.

Q. But you made a determination, as I understand it, that you had enough source material and you felt, therefore, there was no need to rely on the *United States Attorneys' Manual* or consult it.

A. Well, Mr. Corcoran's monogram I think is pretty all encompassing, and the Fishman book is, I gather, one of the state-of-the-art books on the subject.

THE COURT: What book is that?

THE WITNESS: It is a book on electronic surveillance, your Honor, by a man named Fishman.

THE COURT: What is the title of it?

THE WITNESS: I'm not certain. I think it is the *Law of Electronic Surveillance,* perhaps.

MR. REEVE: Your Honor, the author of the book is Clifford S. Fishman, and the title of the book is *Wiretapping and Eavesdropping.*

* * * * *

[52] Q. All right. And one of the requirements of Title III., and I believe it is section 2519, is that the Justice

Department and the court filed reports with the administrative office with respect to each electronic surveillance order. [53] Are you familiar with that provision?

A. Yes.

Q. Were you involved in that?

A. Yes.

Q. And in fact, of course, when you filed those reports with the administrative office, you filed them with respect to each separate order in this case.

A. I didn't actually file them.

Q. In terms of—

A. The Judge actually filed them.

Q. All right. But were you involved in the preparation of that report?

A. I assisted him in putting some information together, yes.

Q. All right. And the way that that report was ultimately filed with the administrative office, was it reported for each separate order?

A. I think that's right.

Q. All right. So getting back to the sentence, the third sentence which you said you relied on, that sentence says, "Immediately upon the expiration of the period of the order or extensions thereof," and I ask you again, how did that support your position that you could hook a [54] bunch of separate orders together and seal at the end of a series of interrelated orders?

A. I can only repeat what I said before, counsel, and I viewed these as interrelated and that is the way I handled it. There is nothing more that I could say about it. I viewed them as extensions of an interrelated investigation.

MR. REEVE: Your Honor, I would like to show the witness Mr. Corcoran's memo. I have a copy. I don't believe that it has been marked as a full exhibit, but I might be wrong. The clerk advises me it was never marked as a

exhibit. I would like to have it marked for identification and as a full exhibit absent of objection by the Government.

What I have is the redacted version of that memo. I do not have the entire version, and I believe that the entire version was filed in camera, but I don't know what filing number that was.

THE COURT: Mark it for identification, counselor.

(*Defendants Exhibit 2438*: Marked for identification.)

MR. REEVE: Mine is approximately [55] ten pages. It has holes in the side which I put there. There are no markings I don't believe on this copy. And with the permission of the Court, I would just ask at this point an opportunity to copy this so I have a copy for my file.

THE COURT: Show it to counsel, maybe he is familiar with it.

MR. REEVE: I think he should be. He prepared it, your Honor.

MR. CORCORAN: No objection.

THE COURT: Full exhibit.

(*Defendants Exhibit 2438*: Received in evidence.)

BY MR. REEVE:

Q. Showing you Defendants Exhibit 2438, which, as I advised you, is not a full copy but is a redacted copy, which was presented to the defense, and if I can direct your attention—you are free to look at any part, but if I could direct your attention to what I believe are the sealing sections, which start on page 26 and end in our redacted version on page 28, can you indicate what language, it any, in that memorandum which has not been marked as Defendants Exhibit 2438, what language, if any, supports your [56] position that the sealing requirement is not activated until the end of numerous interrelated but separate orders?

A. Again, the language is quite similar to the language in the statute that I was relying on. And on page 27 under part C, the standard, the second paragraph, third sentence, it states, "If an extension order has been obtained, the sealing need not be done until the termination of the period covered by the extension, even if there is a hiatus during the period initially authorized," and that is covered by the extension.

Q. There are no references in there, are there, to interrelated orders as being—strike that. There are no references to the Government's flexibility in terms of combining a number of separate orders and then sealing at the end of those numerous orders, are there?

A. No, nor was I aware of any orders with respect to this question.

Q. In fact, in paragraph two on page 27, the third sentence says if an extension has been obtained, the sealing need not be done until the termination of the period covered by the extension, even if there is a hiatus during the period [57] initially authorized and not conferred by the extension; is that correct?

THE COURT: Ask him to explain that hiatus, he used that several times.

BY MR. REEVE:

Q. Can you answer the Court's question?

THE COURT: What do you understand that to mean, this hiatus.

THE WITNESS: As I understand it, your Honor, to me, hiatus was a period like these brief periods that took place a couple of times when we couldn't get the authorization from Washington because someone was out of the country, or the brief period in mid- to late-February when there was a technical difficulty, even though we had authority and the monitoring equipment in place. They

were not—we did not view them nor did they, in fact, become permanent ends to the monitoring to those locations, they were merely brief hiatuses.

* * * * *

[85] BY MR. REEVE:

Q. Was it your understanding at the time that the statutory sealing requirement had—strike that. Was it your understanding at the time that depending upon the number of orders, the number of separate locations in a single order that the fact that there were a number of separate locations in a single order impacted in any way on the statutory sealing requirement?

A. I'm sorry. I don't understand your question, counsel.

Q. Well, you have got for the July 26th order, you have got five separate locations, five separate electronic surveillance intercept locations; correct?

[86] A. Correct.

Q. Does the fact that those five were all applied for and authority was granted in one piece of paper, one order, is it your testimony that that has an impact upon the Government's sealing obligations?

A. I think it certainly shows the wide-ranging extent of this investigation and how it was changing rapidly from location to location. Certainly, why consider it typical in my limited experience with electronic surveillance investigations to have that kind of situation where the investigation involves so many locations at the same time a continual application of authority to request moving from different location to different location and people that were, in fact, moving from location to location on a regular basis?

Q. There are, in fact, a number of cases, both reported and unreported, which deal with a number or a series of wiretap orders; correct?

MR. CORCORAN: I would object only to counsel is asking for authorities which existed at the time.

MR. REEVE: I will rephrase the [87] question.

BY MR. REEVE:

Q. At the time, during the period of 1984, you were aware that there were a number of cases in which there were multiple electronic surveillance orders; correct?

A. I don't know that I was aware of any quite as involved as this one.

Q. That is not my question. My question is, were you aware that there were cases in which there were multiple electronic surveillance orders at different locations?

A. Yes.

Q. All right. And did you look at any of those cases that you were aware of in 1984 where there were multiple electronic surveillance locations to determine whether or not the theory that you are expounding today was applied in any of those multiple operations?

A. I don't remember specifically, counsel, now, which cases I read at that time and exactly what they said. I read cases and I know the language that I relied on talked about extensions and relevant extensions like the language you pointed to in the Georgetown book, and on the [88] basis of that, you know, that language and my feeling that we were following Mr. Ojeda from one residence to another is the basis on which I made the decision.

Q. From any of the four sources you relied on, was there any language in any of those sources which said that related orders at different locations can constitute extensions?

A. The language was scarce as any dealing with that topic. The language that you pointed to and that I pointed to in the other sources that I referred to really don't deal with that question precisely that I am aware of.

Q. So your answer is that there was no such language in the four sources; is that right?

A. I can't point to it now, and if you can point to it, I will be happy to take a look at it.

Q. And you reviewed those sources in preparation for your testimony.

A. I have reviewed the sources that were available to me at the time.

Q. So you can state with confidence that there was no such explicit language in any of the source material you had available to you at the time which said that an order at a different [89] location would constitute an extension of an earlier order?

A. Right now, I can't remember any language one way or the other on that question.

THE COURT: If you carried it through, you might help the witness. In other words, if you had a wiretap at X location covering A and B, and then you subsequently had a renewal or the so-called renewal of the application against A who was then either in a car or at another residence, would you consider the second renewal a bona fide renewal for purposes of sealing because it was one of the two original objectives set forth in the first application?

THE WITNESS: I think, your Honor, what I am saying is that at that time I looked at it as though it was related as an extension of the same investigative authority.

THE COURT: That was your measure?

THE WITNESS: Yes, sir.

THE COURT: All right.

BY MR. REEVE:

Q. As you sit here today, you can't tell us any authority, case law or otherwise which supported your interpretation of extension; is [90] that correct?

A. Well, I can point to the language that I pointed out to you at your request.

Q. All right. Now, you had this, and the record should reflect I am holding in the air this Fishman volume on Wire Taps and Eavesdropping, you had that available to you during 1984, is that correct?

A. Yes.

Q. And did you rely on this as an authoritative or book on wire tapping?

A. I used it on occasion.

Q. All right. And were you aware—is it fair to say, if you know, that this was kind of an authoritative source within the Department of Justice, if you know?

A. I think it is.

Q. All right. And was there any language in the Fishman treatise which supported your novel interpretation? Strike that. Was there any language in the Fishman treatise which supported the interpretation that you have testified about here today?

A. I can't tell now, sir. I haven't look it it within the last several months.

[91] Q. Did you review the Fishman treatise at some point prior to October 11, 1984?

A. I'm not certain, sir. As I said, there were three or four different sources that I was using, and I can't state for certain now whether I looked at it before October of '84, or not.

MR. REEVE: Your Honor, I want to show the witness the Fishman book and direct his attention to section 190 of

that book which is at page 282. I have a copy of that page for the Court. I provided it to Government counsel.

BY MR. REEVE:

Q. Have you turned to page 282 of the Fishman treatise?

A. Yes, I have it.

Q. Would you read the first sentence of section 190, please?

A. "Although Title III. delays the sealing and notice deadline when the initial warranty is extended, it did not postpone those deadlines when a new warrant is obtained on a different phone or premises."

Q. Is there any follow-up to that page I gave the Court and Government counsel? Does that section end at page 282 and another chapter begins?

[92] A. Yes, it does.

Q. So what you have before you and what the Court has before it on page 282 is a full copy of that chapter or section, is it not?

A. It appears to be.

Q. Is there any lack of clarity in this sentence as to how that applies to your theory and your opinion?

A. It is fairly clear.

Q. Is it your testimony that you knew about that section in Fishman which was contrary to your legal theory and ignored it, or that you didn't read that section of Fishman before you ventured forth pursuant to your legal theory?

A. Well, I absolutely deny that I read it and ignored it.

Q. Did you read it?

A. I don't recall specifically. Apparently not, or else I would have given some second thoughts as to what I did.

MR. CORCORAN: Counsel, may I see the exhibit, please.

MR. REEVE: Your Honor, before I show the Government the exhibit, just so that the record is clear, what I would like to do is give [93] the witness the xerox copy which I handed Government counsel and the Government and let the witness tell us if that xerox page which I would propose be marked as the full exhibit is the same as the page from the Fishman treatise that I just reviewed.

THE WITNESS: It looks the same to me.

MR. REEVE: I will show it to Government counsel, but the one page should be marched as a full exhibit. It is, as I already indicated, page 282 of the Fishman treatise.

MR. CORCORAN: No objection. Your Honor.

THE COURT: Very good. Full exhibit.

(*Defendants Exhibit 2440*: Received in evidence.)

BY MR. REEVE:

Q. Is it your testimony, sir, that you were unaware of this section of the Fishman treatise at the time you made your decision not to seal the tapes until October 11th and October 13th of 1984?

A. I don't remember seeing that language.

Q. Is it your testimony that you looked at any of these source materials to make a [94] determination if your legal theory was supported in any way by those materials?

A. I think I have been clear that I did look at those source materials.

Q. Did you look at them before July 25th of 1984 when authority at Levittown expired?

A. I can't state for certain, sir.

Q. Did you look at them before October 11th before you filed the first motion to seal in this case?

A. I think I can pretty well circumstate that I looked at them before.

Q. Did this theory that you have expounded, is this—was this theory developed by you individually or did you

develop it in consultation with others, or did someone tell you about this theory? That is a compound question, I understand, but can you answer it? Where did it come from? Where did this legal theory come from?

A. I'm not sure how to answer your question where it came from. It is the way that I viewed the case at all times.

* * * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

Criminal No. H-85-50 (TEC)

UNITED STATES OF AMERICA

vs.

VICTOR MANUEL GERENA, ET AL., DEFENDANTS

December 2, 1987

Before: The Hon. T. EMMET CLARIE, Senior U.S.D.J.

SUPPRESSION HEARING

* * * * *

[93] Q. All right. What I am going to ask you to do is just one, assuming that that happened on this day in between the removal of reel 6 and placement of reel 7. I am just going to ask you to rewind one of the two machines and we are going to assume that Agent Balizan, or one of the other two agents, is doing the other reel.

And I am going to tell you when it begins and then the Government is going to set their watches and we will put on the record how long it took to rewind and how long the various steps took. All right. All ready? Are you all set to do this?

A. Yes.

Q. I will say ready, set, go.

(Whereupon, the witness complied.)

MR. REEVE: The record should reflect that that rewinding process took approximately one minute, 40 seconds by my watch, give or take a few seconds.

MR. BOYLE: The Government agrees with that.

BY MR. REEVE:

Q. You were prepared at the time you hit that to activate the cassettes; is that right?

[94] A. Yes. It won't stay one.

Q. I stopped my watch at approximately 2:05, and so my my count, it took approximately 25 seconds from the time that the one reel was removed to place the other reel on the machine. I don't know if the Government has similar times.

MR. BOYLE: I accept that representation.

MR. REEVE: All right.

THE COURT: It even agrees with my watch, Counselor.

MR. REEVE: Good. I'm glad there is something consistent.

BY MR. REEVE:

Q. Now, Agent Aponte, you agree that it is physically impossible for you, and however many agents you had to put at that monitoring site, that it is physically impossible for you to change reels and place new reel-to-reels onto those two recorders within two or three seconds and activate?

A. Yes, sir.

Q. That is a physical impossibility; is it not?

A. I am just thinking that probably they take out the reels and place the other two right [95] away.

Q. You have to thread them, right, what you just did; right?

A. I beg your pardon?

Q. You have to thread them as you just did in order to get them to record?

A. Yes, sir.

Q. You can't just slap the reel on there, it has got to be threaded through as you just did in this courtroom?

A. Yes, sir.

Q. And that threading process alone took you approximately 25 seconds; correct?

A. Yes, sir.

Q. And you weren't going slowly, you were trying to do it as you did it at the monitoring site; weren't you?

A. Yes, sir.

Q. And you have never seen anyone in your experience as a monitoring agent change reels in two or three seconds?

A. No, sir.

Q. So your testimony is that it is a physical impossibility to shift from reel 6 to reel 7 in the time—strike that. It is [96] physically impossible to do it in 5 seconds.

A. You are right, sir.

Q. And it is correct, is it not, that these reels are 90 minutes worth of reel; that is, if you run it from the beginning to the end in the record mode, that they can tape 90 minutes worth of conversation?

A. Yes, sir.

Q. And the reason you know that is because there were some tapes that you testified about yesterday where you would put a tape on and it would be continuous interception and that would take approximately one-and-a-half; right?

A. Obviously.

Q. If you don't turn it off, it goes to an hour-and-a-half?

A. Yes.

Q. And your logs with respect to reel 6 indicate that the total amount of conversation or interception is on reel 6 takes 79 minutes?

A. According to the log.

Q. According to the log. So you have about eight-ninths of the tape used up; is that right?

A. Yes, sir.

* * * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

Criminal No. H-85-50 (TEC)

UNITED STATES OF AMERICA

vs.

VICTOR MANUEL GERENA, ET AL., DEFENDANTS

February 17, 1988

Before: The Hon. T. EMMET CLARIE, Senior U.S.D.J.

SUPPRESSION HEARING

* * * * *

[224] BY MR. WIESELMAN:

Q. Sure. Were you a monitor at the Levittown 784-9625, reel number 52 on June 17, 1984? Were you a monitor?

A. I was on duty at that time, sir.

Q. And you had custody of that tape from 3:00 o'clock until 11:30 p.m.; correct?

A. Yes, sir.

Q. At which point you delivered custody to Mr. Yannessa; correct?

A. At 11:30 p.m. on June 17th of 1984.

Q. And you have the 504 in front of you; correct?

A. That is correct, sir.

Q. After Mr. Yannessa received the tape, you have no knowledge what occurred to the tape; is that fair to say?

A. That is correct, sir.

Q. The 504 has no time—withdraw that.

After Mr. Yannessa received the tape [225] after 11:30 on June 17, the 504 indicates that Mr. Yannessa received custody—released custody of tape to Elsur; is that correct?

A. Yes, sir.

Q. The columns for date and time, however, are blank, are they not?

A. That is correct, sir.

Q. So we don't know when Mr. Yannessa released custody to the Elsur room; is that correct?

A. I don't know that, sir.

Q. And although the 504 then indicates that Mr. Salicrup received the evidence on June 18, 1984, we don't know the time he received the evidence; is that correct?

A. I don't know that, sir.

Q. Do you have any reason to believe that this particular interception was not a reel? In other words, did you record Levittown 784-9625 on a cassette, to your knowledge?

A. I do not know that, sir.

Q. Okay.

MR. WIESELMAN: Your Honor, with the Court's permission—

THE COURT: Would it show on your [226] log?

THE WITNESS: On the next page, it has reel number 52 from that number in that reel-to-reel box.

MR. WIESELMAN: Your Honor, with the Court's permission, can we open the original 504 for this reel.

THE COURT: Is this an original?

MR. WIESELMAN: Yes, sir.

THE COURT: Any objection to that?

MR. CORCORAN: No, your Honor.

THE COURT: All right. Do you want to advise the Clerk how that is done so—I guess one advising would be sufficient so we won't spoil the tape.

MR. WIESELMAN: For the record, I am advising the Court and we have slit it on the one or two occasions we have opened it. There is a transparent tape.

BY MR. WIESELMAN:

Q. Agent, I am handing you the original 504, 192 and hopefully tape 52. Could you take—could you remove that box for us, please.

A. (Witness complies.)

Q. That box indicates that it should contain [227] reel number 52; correct?

A. Yes, sir, it does.

Q. And to the best of your recollection, you made a reel on that day, but if I am not mistaken that box contains a cassette. Would you know why this original reel 52 is on a cassette as opposed to a reel?

A. No, sir, I don't.

Q. Now, do you see on the 504 the evidence tape on the bottom; that indicates that Mr. Salicrup placed the evidence in the room on June 19th, but there is a second sealing tape on April 26th of 1986; isn't there?

A. Yes, sir.

Q. Now, I want to show you Government's Exhibit 395—

THE COURT: Excuse me, counselor, so it will be clear to me, was that the date—and I can remember just vaguely—when a court order was issued to make copies of certain cassettes?

MR. WIESELMAN: Yes, sir.

THE COURT: All right.

MR. WIESELMAN: This is Government's Exhibit 395, a 302 documenting the opening of those tapes, and they include this one. And [228]apparently, they were copied, if I am not mistaken. And I show you this simply so that you have a complete record.

BY MR. WIESELMAN:

Q. But do you have any knowledge or recollection or explanation for this as to why it was necessary to open and copy reel 52-C from telephone 784-9625, reel 52.

MR. CORCORAN: It is tape 52.

BY MR. WIESELMAN:

Q. It is tape 52 now.

A. This is this one here?

Q. Yes.

THE COURT: Tape number what?

BY MR. WIESELMAN:

Q. Let me clarify. Do you ever recall using a cassette tape to make an original recording other than A cassettes?

A. No, sir, I don't.

Q. Okay. So to the best of your knowledge, would this tape in front of you now not be the original—obviously it is not the original reel, but do you have any recollection of making this particular cassette?

A. Those are my initials.

[229] Q. These are your initials on it. And you don't recall making that cassette; is that correct?

A. And the date, and I do not recall making this cassette.

Q. What is the date on there?

A. The date is June 17th of 1984 and it is marked down as 52-A.

Q. Do you have any explanation as to how that sticker bearing your initials and date got on this cassette?

A. May I have a minute to review this?

Q. Certainly.

(Pause.)

A. Would you repeat the question, sir?

BY MR. WIESELMAN:

Q. Sure. Can you explain for us how—you testified that you don't recall making any cassettes, so I ask you for an explanation as to how this tape marking with your initials and your handwriting comes to be found on this cassette which purports to be reel—which purports to be reel tape 52 from 784-9625.

A. No, sir, I can't give an explanation for that.

Q. Agent—

[230] THE COURT: Do you know where it was made, that particular tape, or what is written on it?

THE WITNESS: The items written on the tape are—it says USDC-PR 81-39, reel number 52-A, date June 17, 1984. File number 174-A 9:58. Original. Monitor's initials. Those are mine. Telephone number 809-784-9625.

BY MR. WIESELMAN:

Q. Agent, have you ever seen this cassette before?

A. I don't recall, sir.

Q. Is there any way—you don't recall whether you have or not, or you don't recall the cassette?

A. I don't remember having seen it.

Q. And you will confirm your earlier testimony that you never made an original recording, an entire original recording, on a cassette; is that right? To reframe that, other than using cassettes for A cassettes, did you not use cassettes to make the original that was to be sealed with the Court; is that right?

A. That is right, as I said earlier, yes.

Q. And tell me, is there anything in FBI [231] procedures that would allow the removal of an identifying

sticker such as that bearing your signature and placing on another piece of evidence without your consent?

A. No, sir.

Q. In fact, is there anything in FBI procedures that would have allowed the removal of an identification piece of evidence or sticker such as that and placing on another piece of evidence even with your consent, would that be appropriate FBI procedures to the best of your knowledge?

A. No, sir.

THE COURT: How did you come to make this particular tape? Was it an A tape or was it a copy of something else?

THE WITNESS: Sir, the note says 52-A, so it would seem that it was an A tape for telephone number 809-784-9625.

THE COURT: And do you recall having made an A tape?

THE WITNESS: No, sir. Not for those numbers. And those are my initials.

THE COURT: And you put them on?

THE WITNESS: Yes, I put them on.

[232] THE COURT: Why would you put them on unless you had some affiliation with this particular piece of evidence.

THE WITNESS: I would say that I made the tape since those are my initials; and the date on this is June 17th. Excuse me, June 17th of 1984.

THE COURT: And did you make it on the machine or similar type of machine that counsel pointed to on which original recordings were made, or did you simply like go upstairs now and make a recording or a copy of a tape that was already in existence? If you know.

THE WITNESS: No, sir. I would assume that I made it on a cassette recorder as an A tape.

THE COURT: And then kept it as an original.

THE WITNESS: Yes, sir. That is why it was placed in the FD-504.

BY MR. WIESELMAN:

Q. Agent, let's finish up this area if we can, quickly. You have no recollection, you have already testified, of making any original recordings other than A cassettes on little [233] cassettes as opposed to reel-to-reels; is that right?

A. Just A cassettes?

Q. Yes. Log 52 indicates if a tape was made of conversations and you labeled it 52; is that right?

A. That is correct.

Q. There is no indication on that log or anywhere else that A tape 52-A—in other words, an A cassette—was made; is that correct?

A. That is correct, sir.

Q. And generally, if I am correct by looking at your other logs, you write whether you are making an A cassette during a transition, right, generally?

A. Yes, sir.

Q. And that was not done in this case on log 52; is that right?

A. That is correct, sir.

Q. So nothing in the log would indicate that a cassette tape 52-A was made.

THE COURT: What page is that on so I can look at that, too, with you.

MR. WIESELMAN: Page 58 of Volume 2, part one.

[234] THE COURT: Page 58.

MR. WIESELMAN: Of Volume 2, part one.

BY MR. WIESELMAN:

Q. In fact, Agent. that tape 52 was the only telephone tape made for 784-9625 on June 17, 1984. There was no

reel 53 made on June 17, was there? In fact, reel 53 was made the next day on June 18; correct?

A. That is correct, sir.

Q. And the last interception on reel 52 was at 4:19 in the afternoon; correct?

A. That is what the monitor log indicates, sir.

Q. And the reel was removed at what, 11:00, 11:30, as per the log?

A. Yes, sir.

Q. So not only is there no indication that an A tape was made, in fact, to the contrary, every indication from the log would indicate that no A tape was made on June 17, 1984; correct?

A. According to the log, yes, sir.

Q. Because there was no change over of reels on that day, correct, with respect to telephone 784-9625?

[235] A. That is correct, according to the log.

Q. And what we have here that you found in the original 504 envelope purporting to contain original 52-C is a box, an Ampex Precision tape box which generally contains a five-inch reel; correct?

A. That is correct, sir, with the information on the back that reads USDC-PR Number 81-39, reel number 52, date June 17th of 1984. File number 174-A, 9:58 as an original. Monitoring initials OSW. Telephone number 809-784-9625.

Q. And that identifies the content of this box as 52, not 52-A; correct?

A. That is correct, sir.

Q. I am showing you a—

THE COURT: Will you inquire into one more point, counselor. Were A tapes put in this reel-type box, if you know?

THE WITNESS: No, sir. They should have been put in the plastic cassette recorder boxes.

THE COURT: And then into the envelope?

THE WITNESS: Yes, sir.

[236] BY MR. WIESELMAN:

Q. So to clarify something the Court asked earlier, you have no recollection of ever making this tape; is that right?

A. That is correct, sir.

Q. And you have no recollection of ever having seen this tape prior to our pulling it out of this original 504; is that right?

A. That is correct, sir.

Q. And you have no explanation as to how an evidence sticker bearing your writing appears on this cassette; is that correct?

A. I have no recollection, that is correct, sir.

Q. And let me show you the 192—it doesn't matter which, I happen to be showing you a copy of 53-B—but these 192's—and the Court will notice, all have pretyped on them 15-inch reel. Do you see that pretyped notation on this 192?

A. Yes, sir, I do.

Q. And do you see on this original 192 from tape 52 the taping of telephone monitoring on 6/17/84?

A. Yes, sir, I do.

[237] Q. Now, between the words one and the words of, there is a cross-out in pen; is there not?

A. There is, sir.

Q. And that cross out occurs where on these preprinted 192's the words five-inch reel would be, does it not?

A. Repeat the question, please.

Q. Sure. The cross out on that 192 from original tape 152 were on the same spot for preprinted form one would expect to find the typed content five-inch reel?

A. That is correct.

Q. And that is what seems to be crossed out on this original 192 of tape 52; correct?

A. Correct.

Q. And over it are the words "cassette tape" written in pen; correct?

A. Correct, sir.

Q. And is that your handwriting where it says cassette tape?

A. No, sir.

Q. Do you know whose handwriting that is, sir?

A. No, sir.

Q. Is this—are you certain that the 52-A [238] there is your handwriting, or—

A. Yes, sir, that is my handwriting.

Q. And on this box, is reel 52 your handwriting?

A. That appears to be my handwriting.

THE COURT: The curious thing to me is how can you say you never saw the tape before or the box before if your handwriting appears on it?

THE WITNESS: Sir, I don't recall seeing it.

THE COURT: Do you have any explanation of how your handwriting appears thereon and for you not to have seen it?

THE WITNESS: No, sir. But the curious thing there are some notations on the side of the box that is 6/2/84 number 37. And there is another white label pasted underneath this blue tape. I don't know what it contains.

BY MR. WIESELMAN:

Q. Take a look at the log you are looking at for June 7. You are looking at Volume 2, part one and I am going to turn back—we are now on June—you are on June 2?

A. Yes, sir.

[239] Q. Was tape number 37 created on that day for the telephone 784-9625?

A. Yes, sir, it was.

Q. And is that your handwriting on the side of the box, if you recollect?

A. No, sir, it is not.

Q. It is not, is it? And you testified just a moment ago that whenever you made an original reel, you took a cellophane wrapped reel and you opened it to assure that you were using a brand new virgin reel to make your recording; correct?

A. Yes, sir.

Q. So what we have here in this original evidence envelope is a cassette for which you have no explanation and which you maintain you have never seen before; is that right?

A. I maintain that I don't recall seeing it before.

Q. And we have a box in there bearing a sticker placed over another sticker; correct?

A. That is correct, sir.

Q. With writing on the side of the box which you have never seen before; correct?

A. I don't recall seeing it, sir.

Q. Which is not your handwriting?

[240] A. That is correct.

Q. And at least at first blush would appear to contain reel 37, June 2nd of '84, which happens to be the same; but in any event, a reel 37 of 9625 was recorded on June 2nd of 1984; correct?

A. That is correct, sir.

Q. Some 15 days before you recorded 9625 on June 17th of 1984; correct?

A. Correct, sir.

Q. And do you have any explanation why the original box that you used is not in that evidence envelope?

A. No, sir, I don't.

Q. And again, do you have any explanation as to the peculiarity of having in front of us with us the cassette which you don't recall having seen before?

A. No, sir, I have no explanation.

Q. And certainly if you used the original boxes when you take those original boxes to make a brand new reel-to-reel, they don't already have on them a Government sticker such as we see underneath this reel 52, d· they?

A. That is correct, sir.

* * * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

Criminal No. H-85-50 TEC

UNITED STATES OF AMERICA

vs.

VICTOR MANUEL GERENA, ET AL., DEFENDANTS

April 21, 1988

Before: The Hon. T. EMMET CLARIE, Senior U.S.D.J.

SUPPRESSION HEARING

[99] BY MR. REEVE:

Q. Mr. Aschkenasy, you have just indicated your conclusions about ten original tapes which you examined in this case and subjected to the various tests about which you have testified in the last week; is that right?

A. That is correct.

Q. How many tapes were created in Puerto Rico in this case by the FBI?

A. I don't have a number. I have no knowledge of the number, exact number of tapes that were created.

Q. Do you have an understanding of the rough number?

A. I understand it was about a thousand tapes.

Q. So that I understand your testimony, is it is your testimony that you have reached conclusions about only ten of the approximately 1,000 tapes created in Puerto Rico in this case?

A. I can only reach conclusions about those tapes that I analyzed, and in this case, I analyzed ten tapes and I reached conclusions about nine out of the ten.

[100] Q. So your answer to that is you have no conclusions about any of the other tapes created beyond the ten which you examined?

A. Obviously, as I stated in my previous answer.

Q. Yes. And you, as an expert, would not apply your findings with respect to those ten tapes about which you have developed conclusions to the remaining 990-plus tapes, is that right?

A. If I haven't seen them, I have no statement to make about them.

Q. So you would not choose as an expert to speculate about any findings you might or might not make with respect to the 990-plus tapes created in this case in Puerto Rico?

A. I guess speculation belongs in the stock market, not in my field.

Q. So you decline as an expert to give any opinion whatsoever with respect to the authenticity of over 990 tapes created in Puerto Rico in this case?

A. I and any other proper expert would not give an opinion.

Q. So you would not take, for example, the fact that one out of these ten tapes you cannot [101] reach a conclusion as to originality; correct? Strike that.

One out of the ten tapes, original tapes you examined, your expert opinion is you can't reach an opinion about the originality of that one tape?

A. There is no data to support any finding.

Q. And so as you sit here today, it's your opinion that that tape could be an original; right?

A. No finding means no finding.

Q. Right. It could be either an original or copy and you don't know?

A. That's correct.

Q. Having subjected all of your expert tools and abilities to that tape, you have no conclusion?

A. That is correct.

Q. And you would not take that one out of ten finding on these tapes and then predict that on 10 percent of the remaining tapes, you would also not reach a conclusion; right?

A. I would not use that as a predictor, that's correct.

Q. Right. Based on your expertise, you would not make that kind of prediction?

A. I would hope not.

Supreme Court of the United States

No. 89-61

UNITED STATES, PETITIONER

v.

FILIBERTO OJEDA RIOS, ET AL.

ORDER ALLOWING CERTIORARI. Filed October 10, 1989.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted.

October 10, 1989

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